

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HERBERTO PEREDA)	
Claimant)	
VS.)	
)	Docket Nos. 186,311 & 192,322
NATIONAL BEEF PACKING COMPANY)	
Respondent)	
)	
AND)	
)	
LUMBERMEN'S UNDERWRITING ALLIANCE)	
and WAUSAU,)	
Insurance Carriers)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Kenneth S. Johnson on September 17, 1997. The Appeals Board heard oral argument April 1, 1998.

APPEARANCES

Claimant appeared by his attorney, Randy S. Stalcup of Wichita, Kansas. Respondent and its insurance carrier appeared by attorney Shirla R. McQueen of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Randall D. Grisell of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant identifies the following issues on appeal:

- (1) Nature and extent of disability. Is the claimant entitled work disability?
- (2) Average weekly wage. Claimant asks that the value of fringe benefits be added to the average weekly wage. The dollar value of those benefits was not in evidence. But on appeal the parties have stipulated that the weekly value of those benefits was \$57.

In his Application for Review, claimant listed future medical expenses as an issue. But claimant did not brief that issue and at oral argument advised the Board this was not an issue since the Administrative Law Judge has awarded future medical expenses upon proper application to and approval by the Director.

Respondent also filed an Application for Review which raised additional issues. Respondent has now withdrawn its Application for Review and the only issues on appeal are those raised by claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In Docket No. 186,311 claimant has alleged two accidents, one on June 1, 1993, and the second on August 9, 1993. The ALJ found claimant had an accident only on August 9, 1993, and then found that claimant suffered no permanent disability from that accident. In Docket No. 192,322, based on an accident on January 6, 1994, the ALJ found a 5 percent general body injury for injury to the back. After reviewing the record and considering the arguments, the Appeals Board has determined that the Award should be affirmed except as to the findings on average weekly wage.

Findings of Fact

- (1) Claimant suffered accidental injury to his shoulder on August 9, 1993, but not on June 1, 1993. Based on Dr. Blaty's testimony, the Board finds the injury resulted in no additional permanent impairment to claimant's shoulder.
- (2) Claimant suffered an accidental injury to his back on January 6, 1994. Based on Dr. Blaty's testimony, the Board finds this injury resulted in 5 percent impairment to the whole body.

- (3) Claimant was terminated from his employment with respondent because he refused to sign his medical restrictions, acknowledging his awareness of the restrictions.
- (4) The record contains no expert testimony regarding what, if any, work disability claimant might have.

Conclusions of Law

- (1) Claimant is not entitled to permanent disability benefits for Docket No. 186,311, alleging accidental injury on June 1, 1993, and August 9, 1993.
- (2) Claimant is entitled to benefits based on 5 percent permanent partial general disability in Docket No. 192,322 for injury to his back on January 6, 1994.
- (3) Claimant is not entitled to work disability both because he did not make a good faith effort to retain his employment and because there is no evidence in the record which would permit the Board to determine the extent of the work disability, if any. Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).
- (4) Claimant's average weekly wage was \$389.79. The average weekly wage without fringe benefit was \$332.79. At oral argument before the Board, the parties agreed the weekly value of additional compensation was \$57. That additional compensation would have been discontinued at the time claimant was terminated and the value of the additional compensation, in this case \$57, should be added to the base. K.S.A. 44-511.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Kenneth S. Johnson, dated September 17, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Herberto Pereda, and against the respondent, National Beef Packing Company, and its insurance carriers, Lumbermen's Underwriting Alliance and Wausau, for an accidental injury which occurred January 6, 1994, and based upon an average weekly wage of \$389.79 for 20.75 weeks at the rate of \$259.87 per week, for a 5% permanent partial general disability, for a total award of \$5,392.30, all of which is presently due and owing and is ordered paid in one lump sum less amounts previously paid.

The Board approves and adopts all other orders in the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Shirla R. McQueen, Liberal, KS
Randall D. Grisell, Garden City, KS
Office of Administrative Law Judge, Garden City, KS
Philip S. Harness, Director